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Mohd Aizuddin bin Khamis v Public Prosecutor

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-42S-11–03 OF 2018
AHMAD SHAHRIR JC
29 NOVEMBER 2019

C *Evidence — Identification evidence — Quality of identification evidence — Robbery victims identified accused as robber in police identification parade — Parade held three months after robbery took place — Victims unable to point to any special feature about robber's face to categorically say accused was that person — Victims merely relied on accused's general appearance and build — Whether*
D *trial court wrong to have concluded that victims had conclusively identified accused as robber just because CCTV recording showed they could see his face clearly — Whether conviction based solely on victims' identification of accused at parade without other corroborative evidence was unsafe — Whether trial judge had not*
E *considered reasonable probability of honest but mistaken identification of accused given lapse of time between robbery and identification parade*

Criminal Procedure — Defence — Alibi — Whether trial court should have considered accused's alibi evidence against totality of evidence before rejecting the
F *alibi — Whether alibi should not have been rejected simply because trial court believed prosecution's identification evidence had established accused as perpetrator of the crime*

The sessions court had sentenced the appellant to nine years' jail and four
G strokes of the rotan for robbing two persons ('PW1' and 'PW6') in a cybercafé while armed with a machete and making off with RM20,000 belonging to a company. PW1 had gone to the cybercafé and was about to enter the office where PW6 was working when a man wearing a red cap, orange t-shirt and blue jeans suddenly barged into the room, pointed a machete at the two of them and
H demanded all the money they had. Fearing for their safety, the duo handed over to the robber a total of RM20,000, after which he fled. The whole incident, which took less than three minutes, was captured on the cybercafé's CCTV. About three months after the incident, and based on the CCTV recording and information received, a police officer ('PW2') arrested the appellant.
I Thereafter, PW2 searched the appellant's house but did not find anything incriminating. The appellant was later lined up with nine other persons in a police identification parade where both PW1 and PW6 ('the victims') separately identified the appellant as the one who had robbed them. When making his defence at the trial, the appellant said that he was never at the

cybercafé at the material time and was not the robber in the CCTV recording; that he worked as a site supervisor in a company (which fact was confirmed by the testimony of a former officer of the company) earning a monthly salary of RM4,000, and that he owned two residential properties and was a member of a golf club. The appellant said he was most likely at home when the robbery happened and that claim was substantiated by his mother, DW2, in her testimony. The sessions court judge, however, did not believe the appellant's story and found that the prosecution had proved its case against him beyond reasonable doubt. The trial judge found that the victims had positively identified the appellant as the robber since the CCTV recording showed that the place where the incident happened was well lit and the victims had sufficient time to take a good look at the robber's face. The judge also found that the victims had described the robber's race and gender, body size, height, skin complexion and clothing and their identification testimony was not shaken during cross-examination. In the instant appeal against his conviction and sentence, the appellant challenged the reliability of the identification evidence. He said the victims were mistaken because the robber in the CCTV recording wore a cap and a moustache and they could not point to anything distinct about the robber's face which resembled the appellant's. The appellant said he was not arrested based on any photo-fit of the robber; that all those who participated in the identification parade were not of about the same age as him and all of them did not wear a cap or sport a moustache; and that both the investigating officer and the identification parade officer were present when he was identified. The appellant also submitted that the trial judge failed to give sufficient weight to DW2's evidence favouring his alibi. The respondent contended that the alibi evidence could not be relied upon because the appellant had not given proper notice of alibi under s 402A(4) of the Criminal Procedure Code.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The trial judge had found PW1 and PW6 to be credible witnesses and was satisfied with the quality of their identification of the appellant at the identification parade on the ground the area where the robbery took place was brightly lit and the victims were in close proximity to the robber and could clearly see his face and they could also clearly describe his race, gender, body size, height, skin complexion and clothing. But given that the appellant was arrested some three months after the incident, there was no evidence to show that prior to the identification parade being held, the victims had given some description of the special features of the robber other than his build and general description. There was therefore a material weakness in the identification evidence which the trial judge failed to consider (see paras 26 & 32).

(2) If the appellant was arrested based on a photo-fit or some kind of description provided by the victims, that evidence would have been useful for this court to consider whether the appellant fit the description. This would have lent some credibility to the prosecution's evidence that the appellant was arrested based on the victims' description and that his positive identification later at the identification parade confirmed that he was the perpetrator sought after. In the absence of this kind of evidence, there could not be a reasonable or credible basis to find that the appellant was the perpetrator based solely on the identification made by PW1 and PW6 at the identification parade without their first satisfying the court of some affirmative reasons for their ability to identify the appellant as the perpetrator (see para 27).

(3) The fact that the victims had not seen the appellant before the incident could not be lightly brushed aside. A person who had only seen another for the first time might or might not recognise that person a second time unless there were special identifying features which could assist his recollection for the identification. Those features had to be so strong that they struck at the very heart of the identification and was able to rule out any unintentional or honest mistake in identification. It was not for the trial judge to conclude from viewing the CCTV recording that the perpetrator could be, and had been, identified. It was for the eye witnesses to say that they could identify the appellant as the perpetrator and provide reasonable reasons for the affirmative identification. There had to be evidence to show how PW1 and PW6 could identify the appellant as the perpetrator three months after the incident so that the trial court could make a finding as to whether the identification, based on certain identifying features described by the victims, was credible. Without that kind of evidence, how could the trial judge make such an assessment? Having had the opportunity to view the CCTV recording at the appeal hearing, this court was of the view the trial judge's finding that PW1 and PW6 could identify the appellant as the very perpetrator presented certain doubts (see paras 30–31 & 33–34).

(4) Where the prosecution relied heavily on identification evidence and certain aspects of that evidence left room for reasonable doubt, a conviction based solely on the identification evidence without any other corroborative evidence, was unsafe. The issue of identification was a question of fact and would ordinarily be left to the trial judge, who had the audio-visual advantage of seeing and hearing the witnesses, to determine. However, on re-evaluating the evidence in the present case, the court found that the trial judge had failed to judicially appreciate the quality of the identification evidence. He did not deal with the reasonable probability of an honest and mistaken identification of the appellant

given the lapse of time between the robbery and the identification parade, which pertinent fact was not considered by the trial judge (see paras 35–36).

(5) PW2 did not explain the nature of the information he relied upon to arrest the appellant; whether it was in respect of the appellant's description, his locality or any other kinds of information, for the court to assess and consider whether PW2 had arrested the right person in the first place. PW2 did not mention anything about his having viewed the description of the robber from the CCTV recording which led him to arrest the appellant. If PW2 had in fact identified the appellant as the perpetrator based on the CCTV recording, why did he not say so in evidence? (see paras 24 & 29).

(6) The trial judge did not accept DW2's evidence in support of the defence of alibi and found that the alibi defence — which did not conclusively establish that the appellant was at home at the material time — could not outweigh the positive identification of the appellant as the perpetrator by PW1 and PW6. The trial judge should have considered the alibi evidence in relation to the totality of the evidence before deciding to reject it. He was not entitled to reject the alibi evidence simply on the basis the prosecution's evidence in respect of the identification of the appellant by PW1 and PW6 prevailed. He should have embarked on a further exercise to determine whether the alibi evidence, when considered in the light of the totality of the evidence, was of such a nature that it proved to be false (see paras 39–40).

[Bahasa Malaysia summary

Mahkamah sesyen telah menjatuhkan hukuman penjara sembilan tahun dan empat sebatan rotan kerana merompak dua orang ('PW1' dan 'PW6') di dalam sebuah kafe siber dengan bersenjatakan parang dan mengambil kira-kira RM20,000 milik sebuah syarikat. PW1 telah pergi ke kedai siber dan akan memasuki pejabat di mana PW6 bekerja apabila seorang lelaki yang memakai topi merah, baju jingga dan jean biru tiba-tiba masuk ke dalam bilik, menuding parang pada kedua-dua mereka dan menuntut semua wang yang mereka ada. Takut untuk keselamatan mereka, kedua-dua mereka menyerahkan kepada perompak sejumlah RM20,000, dan selepas itu dia melarikan diri. Keseluruhan insiden, yang mengambil masa kurang dari tiga minit, ditangkap di CCTV kafe siber. Kira-kira tiga bulan selepas insiden itu, dan berdasarkan rakaman CCTV dan maklumat yang diterima, seorang pegawai polis ('PW2') menangkap perayu. Selepas itu, PW2 membuat carian di rumah perayu tetapi tidak menemui apa-apa yang mencurigakan. Perayu kemudiannya berbaris dengan sembilan orang lain dalam kawad cam polis di mana kedua-dua PW1 dan PW6 ('mangsa') mengenal pasti perayu secara berasingan sebagai orang yang merompak mereka. Semasa membuat pembelaannya di perbicaraan, perayu mengatakan bahawa dia tidak pernah

berada di kafe siber pada masa yang material dan bukan perompak dalam rakaman CCTV; bahawa dia bekerja sebagai penyelia tapak di sebuah syarikat (fakta yang disahkan oleh testimoni seorang bekas pegawai syarikat) yang memperoleh gaji bulanan sebanyak RM4,000, dan bahawa dia memiliki dua harta kediaman dan merupakan ahli kelab golf. Perayu berkata dia mungkin berada di rumah ketika rompakan itu berlaku dan dakwaan itu dibuktikan oleh ibunya, DW2, dalam kesaksiannya. Hakim mahkamah sesyen, bagaimanapun, tidak mempercayai cerita perayu dan mendapati pendakwaan telah membuktikan kes terhadapnya melampaui keraguan munasabah. Hakim bicara mendapati bahawa mangsa telah mengecamkan secara positif perayu sebagai perompak memandangkan rakaman CCTV menunjukkan di mana kejadian berlaku adalah terang dan mangsa mempunyai masa yang mencukupi untuk melihat wajah perompak itu. Hakim juga mendapati bahawa mangsa telah menyifatkan bangsa dan jantina, saiz badan, ketinggian, kulit dan pakaian perompak dan testimoni pengecaman mereka tidak terancam semasa pemeriksaan balas. Dalam rayuan ini terhadap sabitan dan hukumannya, perayu mencabar kebolehpercayaan keterangan pengecaman. Dia berkata mangsa tersilap kerana perompak dalam rakaman CCTV memakai topi dan bermisai dan mereka tidak dapat menunjuk apa-apa yang jelas mengenai wajah perompak yang menyerupai perayu. Perayu mengatakan bahawa dia tidak ditangkap berdasarkan mana-mana gambar suai perompak itu; bahawa semua orang yang mengambil bahagian dalam kawad cam itu bukanlah sama usia dengannya dan mereka semua tidak memakai topi atau mempunyai misai; dan bahawa kedua-dua pegawai penyiasat dan pegawai kawad cam hadir ketika dia dikenal pasti. Perayu juga mengemukakan bahawa hakim bicara gagal memberi berat yang mencukupi kepada keterangan DW2 yang memihak alibinya. Responden berpendapat bahawa keterangan alibi tidak boleh dipercayai kerana perayu tidak memberikan notis alibi yang betul di bawah s 402A(4) Kanun Tatacara Jenayah.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan melepaskan dan membebaskan perayu:

(1) Hakim bicara telah mendapati PW1 dan PW6 sebagai saksi yang boleh dipercayai dan berpuas hati dengan kualiti pengecaman mereka terhadap perayu pada kawad cam di atas alasan di mana kejadian rompakan tersebut adalah terang dan mangsa berada berdekatan dengan perompak dan jelas dapat melihat wajahnya dan mereka juga boleh jelas menggambarkan bangsa, jantina, saiz badan, ketinggian, kulit dan pakaian. Tetapi memandangkan perayu ditangkap kira-kira tiga bulan selepas kejadian itu, tidak ada keterangan untuk menunjukkan bahawa sebelum kawad cam diadakan, mangsa telah memberikan gambaran mengenai ciri-ciri khas perompak itu selain daripada perihalan dan deskripsi umumnya. Oleh itu, terdapat kelemahan material dalam

keterangan pengecaman yang tidak dipertimbangkan hakim bicara (lihat perenggan 26 & 32).

(2) Sekiranya perayu telah ditangkap berdasarkan gambar suai atau deskripsi yang diberikan oleh mangsa, keterangan itu berguna bagi mahkamah ini untuk mempertimbangkan sama ada perayu sesuai dengan perihalannya. Ini akan memberikan kredibiliti kepada keterangan pihak pendakwaan bahawa perayu telah ditangkap berdasarkan keterangan mangsa dan pengecaman positif selanjutnya di kawad cam mengesahkan bahawa dia adalah pelaku yang dicari. Dalam ketiadaan keterangan seperti ini, tidak ada asas yang munasabah atau boleh dipercayai untuk mendapati bahawa perayu adalah pelaku yang hanya berasaskan pengenalan yang dibuat oleh PW1 dan PW6 pada kawad cam tanpa terlebih dahulu memuaskan mahkamah atas beberapa alasan afirmatif kerana keupayaan mereka untuk mengenal pasti perayu sebagai pelaku (lihat perenggan 27).

(3) Hakikat bahawa mangsa tidak pernah melihat perayu sebelum insiden tersebut tidak dapat diketepikan dengan ringan. Seseorang yang hanya melihat satu lagi untuk kali pertama mungkin atau mungkin tidak mengenali orang itu untuk kali kedua melainkan ada ciri pengenalan khas yang boleh membantu ingatannya untuk pengecaman. Ciri-ciri tersebut perlu begitu kuat sehingga ketika pengecaman dapat menolak sebarang kesilapan yang tidak disengajakan dalam pengecaman. Ia bukan untuk hakim bicara untuk membuat kesimpulan daripada melihat rakaman CCTV bahawa pelaku boleh, dan telah, dikenalpasti. Ia adalah untuk saksi mata untuk mengatakan bahawa mereka boleh mengenal pasti perayu sebagai pelaku dan memberikan sebab yang munasabah untuk pengecaman afirmatif. Perlu terdapat keterangan untuk menunjukkan bagaimana PW1 dan PW6 dapat mengenal pasti perayu sebagai pelaku tiga bulan selepas insiden itu supaya mahkamah bicara boleh membuat penemuan sama ada pengecaman, berdasarkan ciri-ciri tertentu yang diterangkan oleh mangsa, adalah kredibel. Tanpa keterangan seperti itu, bagaimanakah hakim bicara membuat penilaian sedemikian? Memiliki peluang untuk melihat rakaman CCTV di perbicaraan rayuan, mahkamah ini berpendapat bahawa penemuan hakim bicara mendapati bahawa PW1 dan PW6 dapat mengenal pasti perayu sebagai pelaku menimbulkan keraguan tertentu (lihat perenggan 30–31 & 33–34).

(4) Apabila pihak pendakwaan terlalu bergantung pada keterangan pengecaman dan aspek tertentu keterangan yang meninggalkan ruang untuk keraguan munasabah, suatu sabitan hanya berdasarkan keterangan pengecaman tanpa keterangan lain yang dapat diterima, adalah tidak selamat. Isu pengecaman adalah persoalan fakta dan biasanya akan ditinggalkan kepada hakim bicara, yang mempunyai kelebihan audio-visual untuk melihat dan mendengar saksi, untuk menentukan.

Walau bagaimanapun, apabila menilai semula bukti dalam kes ini, mahkamah mendapati bahawa hakim bicara gagal menghargai kualiti keterangan pengecaman. Beliau tidak mempertimbangkan dengan kebarangkalian munasabah kesilapan pengecaman perayu memandangkan masa yang berlarutan di antara rompakan dan kawad cam, yang mana fakta berkaitan tidak dipertimbangkan oleh hakim bicara (lihat perenggan 35–36).

(5) PW2 tidak menerangkan jenis maklumat yang dia bergantung kepada untuk menangkap perayu; sama ada berkenaan dengan perihal perayu, lokalitinya atau apa-apa jenis maklumat lain, bagi mahkamah untuk menilai dan menimbangkan sama ada PW2 telah menangkap orang yang betul pada mulanya. PW2 tidak menyebut apa-apa tentang dia setelah melihat perihal perompak daripada rakaman CCTV yang membawa dia menangkap perayu. Jika PW2 sebenarnya telah mengenal pasti perayu sebagai pelaku berdasarkan rakaman CCTV, mengapa dia tidak mengatakannya dalam keterangan? (lihat perenggan 24 & 29).

(6) Hakim bicara tidak menerima keterangan DW2 sebagai sokongan pembelaan alibi dan mendapati bahawa pembelaan alibi — yang tidak secara konklusif menetapkan bahawa perayu berada di rumah pada waktu yang material — tidak dapat mengalahkan pengecaman positif perayu sebagai pelaku oleh PW1 dan PW6. Hakim bicara sepatutnya menimbangkan keterangan alibi sehubungan dengan keseluruhan keterangan sebelum memutuskan untuk menolaknya. Beliau tidak berhak untuk menolak keterangan alibi semata-mata berdasarkan keterangan pihak pendakwaan berkenaan dengan pengecaman perayu oleh PW1 dan PW6. Beliau sepatutnya memulakan satu lagi usaha untuk menentukan sama ada keterangan alibi, apabila dipertimbangkan berdasarkan keseluruhan keterangan, adalah sedemikian rupa bahawa ia terbukti salah (lihat perenggan 39–40).]

Cases referred to

Dato' Seri Anwar Ibrahim v PP & another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737; [2004] 5 AMR 265, FC (refd)

Duis Akim & Ors v PP [2014] 1 MLJ 49, FC (refd)

Lim Kheak Teong v PP [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207; [1984] 1 MLRA 126, FC (refd)

Periasamy Sinnappan v PP [1996] 2 MLJ 557; [1996] 3 CLJ 187; [1996] 1 MLRA 277; [1996] 2 AMR 2511, CA (refd)

R v Turnbull and others [1976] 3 All ER 549, CA (refd)

Legislation referred to

Criminal Procedure Code ss 316, 402A(4)
Penal Code s 397

Izleen bt Ismail (Izleen) for the appellant.
Fatin Hanum bt Abdul Hadi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Shahrir JC:

INTRODUCTION

[1] This is an appeal against the decision of the learned sessions court judge in convicting and sentencing the accused to nine years of imprisonment and four strokes of whipping for an offence under s 397 of the Penal Code. The appeal is against both the conviction and sentence meted out by the learned sessions court judge. In this judgment, the parties are referred to as they were at the trial court.

THE CHARGE

[2] The charge which was proffered against the accused reads as follows:

> Bahawa kamu pada 01.07.2016 jam lebih kurang 4:25 petang di premis No. 5 Jalan 4/93, Taman Miharja 2, Cheras, di dalam Daerah Cheras, dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah melakukan rompak bersenjata parang ke atas penama Wong Hung Fai (No. K/P: 860210–56–5051) dan Lee Kit Wai (No. K/P: 970207–14–5897) dengan melarikan wang tunai RM20,000.00 milik syarikat Extreme Net. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 392/397 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

BRIEF FACTS

The prosecution's case

[3] On 1 July 2016, the complainant, Wong Hung Fai ('PW1') went to meet his friend, Lee Kit Wai ('PW6') at a cybercafé at No 5, 4/93 Taman Miharja, Cheras, Kuala Lumpur. PW6 worked at the cybercafé. At the cybercafé, PW1 said he saw a Malay guy entered the cybercafé. According to PW1, the Malay guy was wearing a red cap, an orange-coloured t-shirt and a pair of blue jeans. PW1 went to the right of the cybercafe to meet PW6 who was then manning the counter situated in a small room in the cybercafé whereas the Malay guy headed towards the left.

[4] PW6 later opened the door to the small room to allow PW1 to enter. At this point in time, the Malay guy suddenly made a quick turn and headed towards PW1. The Malay guy then took out a machete and pointed it at PW1 and directed PW1 to enter the small room. In the room, the Malay guy threatened both PW1 and PW6 and told them to take out all the money they

had. Both PW1 and PW6 handed out to the Malay guy a total of RM20,000 out of fear for their safety. According to PW1, the money he handed over to the Malay guy belonged to Extreme Net, a company who had entrusted him with the money for payment of workers' salary and rental. The Malay guy then told PW1 and PW6 to go into the toilet and shortly thereafter, the Malay guy fled the scene.

[5] Approximately three months after the incident, Insp Matthews a/l Nallathambi Pillai ('PW2') arrested the accused on 10 October 2016 at about 12:50 noon. The accused was arrested beside the road at Jalan Cempaka Putih, in Kajang, Selangor. According to PW2, the arrest was made based on information. PW2 lodged a police report vide Kajang Report No 36721/16 (exh P5) to document the arrest. PW2 then handed the accused over to the investigating officer, Sgt Hafiz bin Hassan ('PW4'). Later at about 4:45pm on the same day, PW2 went to the accused's house at No 4, Jalan AU 3/14, Taman Sepakat, Keramat, Kuala Lumpur to make a search but nothing incriminating was found. PW2 lodged a police report for the search at the accused's house vide Hulu Klang Report No 5705/16 (exh P6).

[6] On 10 October 2016 at about 4:30pm, Insp Mazlan bin Ali ('PW5') made arrangements to hold an identification parade. The identification parade was carried out at the identification parade room at the Dang Wangi Police District Headquarters and a total of ten participants including the accused were lined-up for identification. According to PW5, the accused chose position No 8 in the line-up. PW5 then said in evidence that both PW1 and PW6 had separately identified the accused as the perpetrator.

[7] At the close of prosecution, the learned sessions court judge found that the prosecution has succeeded in establishing a prima facie case and ordered the accused to enter his defence. The accused elected to give his defence under oath and called three witnesses for the defence including the accused himself.

The defence's case

[8] In his defence, the accused denied being present at the scene of the incident at the material time. The accused relate the fact that he was properly employed as a site supervisor with Impian Ozana Marketing (M) Sdn Bhd, a company owned by his brother, Zuraimi. The accused earned an initial monthly salary of RM3,000 and later he received a monthly salary of RM4,000 after an increment. His job scope involved supervising projects for his employer as well as accompanying the company's customers on golf trips to Singapore and Indonesia. The accused produced copies of his previous and current passports (exhs D10 and D11) to evidence that fact and a membership card for a golf club (exh D12). The accused also owned two properties, one is

a condominium in Johor Bahru at the rice of RM192,999 and the other is a house in Malacca at the price of RM55,000.

[9] On the date when he was arrested, the accused said he went to Kajang to settle certain matters at the Income Tax Department. After he parked his car and got out, suddenly three police officers came towards him and arrested him. He was later brought by the police to his home where the police searched his house but nothing incriminating was found. On 11 October 2016 at about 4:30pm, he was placed in a line-up together with nine other persons for an identification parade. At that time, the accused was clad in the orange lock-up outfit. Throughout the process of the identification parade, the accused said he was not informed that he has the choice to change his position in the line-up.

[10] The incident took place on 1 July 2016 at about 4:25pm, which was a Friday. In his defence, the accused also relate that normally on Fridays between 12:00–12:30 noon, he would fetch his sister, Nur Sabrina Aisyah bt Khamis, from school at SMK Aminuddin Baki at Kampung Pandan, Kuala Lumpur and back to DW2's house at No 4, Jalan AU3/14, Taman Sepakat, Ampang, Ulu Klang. He drove his company's Toyota Hilux. Upon arriving home, the accused said he would normally take a rest and would not go out as traffic would be unusually heavy on Fridays. The accused said that on Friday afternoon he normally settles work-related matters over the phone. The accused said he was at home on 1 July 2016 at about 4:25pm.

[11] The accused also said that when he watched the CCTV recording that was played in court during trial, the perpetrator in the CCTV recording is not him. The perpetrator had a different body built. The perpetrator has a moustache whereas he never had one. All his photographs in his passport and the golf membership card also show that he did not spot a moustache.

[12] The evidence of the accused's mother, Zultini bt Mohamed Rabani ('DW2'), supported that of the accused. DW2 said that on the date and time in question, just like any other Fridays, she believed the accused was at home after having picked up his sister from school in the afternoon. After performing Friday prayers, the accused had lunch at home as he normally would. In cross-examination, DW2 said that she was convinced the accused was at home because the accused's Toyota Hilux was at home. The former manager for human resources at Impian Ozana Marketing (M) Sdn Bhd, Sulaiman bin Saraman ('DW3'), confirmed that the accused was employed as a site supervisor for the company.

[13] At the close of defence, the learned sessions court judge found that the accused has failed to raise a reasonable doubt in the prosecution's case and that the prosecution has succeeded in proving the charge against the accused

beyond reasonable doubt. The accused was convicted and sentenced to imprisonment for the period of nine years and four strokes of whipping.

BRIEF DELIBERATIONS

Contention of the appellant

[14] The main contention advanced by the counsel is the identification of the accused. According to the counsel, the rise or fall of the case against the accused depended on the identification evidence. It is not in dispute that both the eye witnesses, namely PW1 and PW6 had not known the accused before the incident. Hence, when they singled out the accused as the perpetrator, it was based purely on identification and not recognition.

[15] The CCTV recording which was viewed at the trial court showed that the incident took less than three minutes. It showed the image of the perpetrator wearing a cap and he has a moustache whereas the accused has none. None of the eye witnesses relate any distinct features on the face of the perpetrator which could aid them in identifying the accused as the very person. PW1 even confirmed in cross-examination that there was nothing especially distinct about the face of the perpetrator. PW1 and PW6 did not give any description of the perpetrator to the police and repeatedly said that they identify the accused as the perpetrator because that was the first time they were being robbed. Based on these circumstances, learned counsel submits that PW1 and PW6 could not have correctly identified the accused as the perpetrator at the material time.

[16] The counsel also challenges the conduct of the identification parade as improper and unreliable based on the following reasons:

(a) all the participants (aged between 20–39) in the line-up for the identification parade were not of about the same age as the accused (32 years old) and all of them did not wear a cap or spot a moustache;

(b) the accused was not given the opportunity to change his position in the line-up; and

(c) the investigating officer ('PW4') and the identification parade officer, Insp Mazlan bin Ali ('PW5') were present when the accused was identified by PW1 and later by PW6.

[17] The counsel also contends that the dock identification of the accused by PW1 and PW6 should not be accepted. The accused was sitting alone in the dock and in the absence of any description of the accused by PW1 and PW6 as the perpetrator, the dock identification presents no evidentiary value.

[18] The accused's mother, Zultini bt Mohamed Rabani (DW2) gave alibi evidence in favour of the accused. Thus, it is the duty of the learned sessions court judge to consider whether on the balance of probabilities the alibi defence is capable of raising a reasonable doubt in the prosecution's case. Learned counsel contends that the learned sessions court judge had failed to judicially consider the alibi defence.

Contention of the respondent

[19] On the other hand, the contention of the learned DPP may be summarised as follows:

(a) that the identification of the accused at the identification parade by PW1 and PW6 as the perpetrator were good and reliable and they were the eye witnesses and victims in the robbery;

(b) that the findings made by the learned sessions court judge is correct that both PW1 and PW6 could clearly see the face of the perpetrator as his face was not covered, they were in close proximity with the perpetrator and that the room was brightly lit;

(c) that the description of the accused given by PW1 and PW6, namely that of the race and gender of the perpetrator, body size, height, complexion and clothing were convincing since they were in close proximity with the perpetrator for about two to three minutes;

(d) that the dock identification was reliable and satisfactory and that the rule in *R v Turnbull and others* [1976] 3 All ER 549 has been fulfilled during the identification parade; and

(e) that in respect of the defence of alibi, the accused has failed to comply with s 402A(4) of the Criminal Procedure Code in that the date, time and location of the accused were not specified in the notice of alibi. As such the alibi evidence must not be accepted.

EVALUATION

[20] In hearing an appeal from a subordinate court, the duty of this court is provided for under s 316 of the Criminal Procedure Code.

Section 316 of the Criminal Procedure Code provides as follows:

> 316 Decision on appeal
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —

A (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be retried, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction or in an appeal as to sentence —

B (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

C (c) in an appeal from any other order, alter or reverse such order.

[21] It is also trite that in exercising its appellate powers, the High Court should properly consider and carefully weigh matters such as:

D (a) the views of the trial judge on the credibility of witnesses;

(b) the presumption of innocence in favour of the accused;

(c) the right of the accused to the benefit of any doubt; and

E (d) the slowness of an appellate court in disturbing a finding of fact arrived at by a trial judge who had the advantage of seeing the witnesses.

(See *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207; [1984] 1 MLRA 126 (FC) and *Periasamy Sinnappan v Public Prosecutor* F [1996] 2 MLJ 557; [1996] 3 CLJ 187; [1996] 1 MLRA 277; [1996] 2 AMR 2511 (CA)).

[22] Despite the iteration of the principle that an appellate court should be G slow in disturbing a finding of fact of the trial judge who obviously had the audio-visual advantage of the seeing the witnesses, it is equally observed that the appellate courts should also examine the evidence and circumstances which form the basis of the finding made by the trial judge to determine whether there are any compelling reasons to disagree with the findings. In *Dato' Seri Anwar* H *Ibrahim v Public Prosecutor & another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737; [2004] 5 AMR 265 (FC), His Lordship Abdul Hamid Mohammad FCJ (as His Lordship then was) made the following reminder:

> Clearly, an appellate court does not and should not put a brake and not going any I further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case 'there are substantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a

question of law but also on a question of fact or on a question of mixed fact and law would be meaningless. A

[23] In the present appeal, the prosecution's case hinges mainly on identification evidence. The learned sessions court judge made a finding that both the eye witnesses, namely PW1 and PW6, could identify the accused because: B

(a) firstly, during the incident, the face of the accused was not covered and the view of both the eye witnesses were not impeded or obstructed;

(b) secondly, the lighting in the room was bright; C

(c) thirdly, the victims who were the eye witnesses had a good look at the accused when he pointed a *parang* at them; and

(d) fourthly, the positive identification of the accused by the eye witnesses remained unshaken in cross-examination. D

[24] According to PW2, he arrested the accused based on information and that the accused was not randomly picked up beside the road. But there was no further explanation from PW2 as to the nature of the information, whether it was in respect of the description of the accused, the locality of the accused or any other kinds of information for this court to make an assessment and consider whether PW2 got the right person in the first place. E

[25] In the grounds of judgment, the learned sessions court judge clearly mentioned that the case against the accused is based substantially on the evidence of identification of the accused by both PW1 and PW6. The process of the identification parade may have been fairly conducted. But before one could accept the result of the identification parade, I hold the considered view that in a case such as the present appeal where the alleged perpetrator was only arrested some three months after the incident, one must first ask these crucial questions: Firstly, was there sufficient and distinct identifying features described by the witnesses of the alleged perpetrator which could then confirm his eventual identification by the witness during the identification parade as one which can be safely accepted as correct? Secondly, could the probability of an honest but mistaken identification be satisfactorily ruled out? F G H

[26] What then was the basis when the learned sessions court judge made a finding that he was satisfied with the quality of identification of the accused by both PW1 and PW6 based on the identification parade? In the grounds of judgment, the findings made by the learned sessions court judge in this regard may be briefly stated as follows: I

(a) the room at the cybercafe where the robbery took place was brightly lit;

(b) PW1 and PW6 could clearly see the face of the perpetrator as his face was not covered and the CCTV recording corroborates this fact;

(c) PW1 and PW6 was at a close distance with the perpetrator and the CCTV recording corroborates this fact;

(d) PW1 and PW6 could clearly and convincingly describe the race, gender, body size, height, skin complexion and clothing of the perpetrator;

(e) from the CCTV recording, both PW1 and PW6 had a good look at the perpetrator; and

(f) PW1 and PW6 are credible witnesses.

[27] With respect, I am of the considered view that the grounds provided by the learned sessions court judge in this regard are not satisfactory. If the arrest by PW2 was based on a photo-fit or some kind of description of the accused provided by PW1 or PW6, that evidence would be useful for this court to consider whether the accused fit that description. This would lend some credibility to the evidence led by the prosecution that the accused was picked up based on the description of the eye witnesses and the positive identification of the accused later at the identification parade confirmed that the accused is in fact the perpetrator sought after. In the absence of this kind of evidence, I am of the considered view that there cannot be a reasonable or credible basis for a finding to be made that the accused is the perpetrator based solely on the identification made by PW1 and PW6 at the identification parade without PW1 and PW6 first satisfying the court of some affirmative reasons as to their ability to identify the accused as the perpetrator at the material time.

[28] It is also pertinent to consider that PW2 also said that when he went to the accused's house later in the day, he was looking for some kind of exhibits which may incriminate the accused. When pressed by learned counsel in cross-examination, PW2 said he was looking for the machete and the orange t-shirt but did not find them at the accused's house. In fact, there was nothing incriminating found at the house.

[29] Other than saying that he could identify the accused as the perpetrator, PW1 did not give any description of the accused. On the other hand, PW6 in his evidence described the perpetrator as a Malay man with a red cap wearing an orange shirt and a pair of blue jeans. He had 'brown' complexion with a body built that is slimmer than PW1 but fatter than PW6 himself. The perpetrator had almost the same height as PW1. This description was echoed almost similarly by the investigating officer, PW4, and during re-examination PW4 explained that he had handed over the CCTV recording to PW2 so that PW2 could make the arrest. Interestingly however, PW2 did not mention anything about him having had the description of the perpetrator from the

CCTV recording which then had led him to be able to identify the accused as the perpetrator when PW2 made the arrest. If PW2 had in fact identified the accused as the perpetrator based on the CCTV recording, why didn't PW2 say so in evidence?

[30] When the appeal was heard, the CCTV recording was played in this court at the instance of learned counsel. Having had the opportunity to view the CCTV recording, I am of the considered view that the findings made by the learned sessions court judge that both PW1 and PW6 could identify the accused as the very perpetrator presents certain doubts. I must, at this juncture, make it clear that this court is not making any findings as far as the images in the CCTV recording is concerned but merely re-evaluating the evidence relied on by the learned sessions court judge to determine whether the findings so made is supported by the evidence, namely the CCTV recording.

[31] I am of the considered view that it is not for the trial judge to determine whether he can identify the perpetrator when he viewed the CCTV recording. But it is for the trial judge to be satisfied in finding that the eye-witness could identify the accused as the very Malay guy who had robbed them on the material date upon considering the totality of the evidence in that regard including the CCTV recording.

[32] It is undisputed that the accused was only arrested some three months after the incident and there was no evidence to show that prior to the identification parade being held, some description depicting special features of the accused were given by the eye witnesses other than the body-built of the accused and the general description of the accused having a moustache. I am of the considered view that there is a material weakness in the identification evidence which the learned sessions court judge has failed to consider.

[33] The fact that both the eye witnesses had not seen the accused before the incident must not be lightly brushed aside and must be carefully considered when the three months period which had elapsed between the incident and the subsequent identification of the accused at the identification parade are factored in the equation. A person who had only seen another for the first time may or may not recognise that person when he sees him for the second time unless there are special identifying features which could assist his recollection for the identification. These features must be so strong that it strikes at the very heart of the identification of the accused and able to rule out any unintentional or honest mistake in identification.

[34] With respect, I am of the considered view that it is not for the learned sessions court judge to make a conclusion that the perpetrator could be identified and had so been identified. It is for the eye witnesses themselves to

say that they could identify the accused as the perpetrator and provide reasonable reasons for the affirmative identification. PW1 and PW6 were the ones present at the material time. Only they know how they could positively identify the accused as the perpetrator during the identification parade which was carried out some three months after the incident. Hence, there must be evidence to show how PW1 and PW6 identified the accused as the perpetrator to enable the trial court to make a finding as to whether the eventual identification of the accused as the perpetrator based on the identifying features described by PW 1 and PW6 are credible. In the absence of that kind of evidence, how then could the trial judge make such an assessment?

[35] I am of the considered view that in a case where the prosecution relies heavily on identification evidence and certain aspects of the identification leaves room for reasonable doubts, a conviction based solely on that identification evidence without any other evidence to corroborate that identification would be unsafe in the circumstances (see *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49 (FC)). The issue of identification is a question of fact and would, ordinarily, be left to the trial judge who had the audio-visual advantage of the witnesses. However, after re-evaluating the evidence, I hold the considered view that based on the peculiar facts of the present appeal and the evidence adduced by the prosecution, the learned sessions court judge has failed judicially appreciate the quality of the identification evidence.

[36] After re-evaluating the whole of the evidence and reviewing the grounds of judgment of the learned sessions court judge, I am of the considered view that the learned sessions court judge did not deal with the reasonable probability of an honest and mistaken identification of the accused being made by PW1 and PW6 in his judgment. This is a crucial fact which could not be left out of consideration because of the span of time which had elapsed between the incident and the identification parade. It is pertinent and must be considered but unfortunately this was not done in the present appeal.

ALIBI DEFENCE

[37] In respect of the defence of alibi, the learned sessions court judge made a ruling that the defence of alibi will still be considered despite the notice of alibi put up by the defence did not meet the requirements of s 402A(4) of the Criminal Procedure Code. For the record, although the learned sessions court judge noted that the defence has placed before him the notice of alibi during case management, the purported notice of alibi does not form part of the appeal record and this court is unable to determine whether in fact it has not complied with s 402A(4) of the Criminal Procedure Code. Be that as it may, this court will proceed to consider whether the learned sessions court judge has

properly considered the alibi defence on the basis that a notice to that effect has been given. A

[38] In *Duis Akim & Ors v Public Prosecutor* His Lordship Richard Malanjum CJ (Sabah and Sarawak) (as His Lordship then was) in delivering the judgment of the apex court recapitulate the following principles to consider with regard to the defence of alibi as follows: B

> [92] Now, the following legal principles on the defence of alibi are relevant in the present namely:
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> (a) 'the defense of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission' (see *Regina v Youssef* (1990) 50 A Crim R1 at pp 2–3); C
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> (b) the correct 'approach to be adopted in regard to an alibi defence, ... *is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt*' (see *S v Leve (CA&R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa). (Emphasis added.); D E
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> (c) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true' (see: *R v Hlongwane* [1959] (3) SA 337); F
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> (d) '(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. *The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false*' (see *S v Liebenberg* 2005(2) SACR 355 (SCA). (Emphasis added.); G H
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> (e) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime' (see *Mutachi Stephen v Uganda*). The evidence of his alibi need only raise a reasonable doubt that he committed the crime (see *R v Lizotte* 1950 CanLll 48 (SCC); [1951] SCR 115); and I
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> (f) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (see *R v Letourneau* [1994] BCJ No 265 (QL)(CA), 61).

[39] The learned sessions court judge did not accept the evidence of DW2 in support of the defence of alibi and made a finding that the alibi defence could not outweigh the positive identification of the accused by both PW1 and PW6. The learned sessions court judge also considered the fact that the evidence of DW2 only went so far as to show the likelihood of the accused to be at home at the material time as distinguished from the fact that the accused was indeed actually at home. The learned sessions court judge considered the alibi defence in light of the evidence of the accused himself that the accused would leave home even on a Friday if he received a call from his office and came to a finding that the alibi defence, in that sense, are contradictory of the fact sought to be established and ought not to be accepted.

[40] In considering the alibi defence, I am of the considered view that it is imperative for the learned sessions court judge to consider it in relation to the totality of the evidence placed before the trial court. The learned sessions court judge is not entitled to reject the alibi evidence simply on the basis that the prosecution's evidence in respect of the identification of the accused by PW1 and PW6 had prevailed. The learned sessions court judge must embark on a further exercise to determine whether the alibi evidence, when considered in light of the totality of the evidence is of such a nature that proved the alibi to be false. In this regard, with respect, I am of the considered view that the learned sessions court judge has misdirected himself when he failed to consider the falsity of the alibi evidence when juxtaposed with the whole of the evidence before deciding to reject it.

CONCLUSION

[41] On premise of the aforesaid reasons, I am of the considered view that the conviction is unsafe to be sustained. I hereby allow the appeal and set aside the conviction and sentence. The accused is hereby acquitted and discharged.

Appeal allowed, conviction and sentence set aside.

Reported by Ashok Kumar